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In the Supreme Court of the United States

OCTOBER TERM, 1963

JIM GARRISON,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Application for Appeal from the Supreme Court of Louisiana or Alternatively Writ of Certiorari to the Supreme Court of Louisiana

MOTION TO DISMISS OR AFFIRM ON BEHALF OF THE STATE OF LOUISIANA

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No. 400

In the Supreme Court of the United States

OCTOBER TERM, 1963

JIM GARRISON,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Application for Appeal from the Supreme Court of Louisiana or Alternatively Writ of Certiorari to the Supreme Court of Louisiana

MOTION TO DISMISS OR AFFIRM ON BEHALF OF THE STATE OF LOUISIANA

Pursuant to Paragraph 1C of Rule 16 of the revised rules of this Court, Jack P. F. Gremillion, Attorney General of the State of Louisiana and the State of Louisiana move that this appeal be dismissed and that the alternative plea for writ of certiorari be denied, and in the alternative that the judgment of the Louisiana Supreme Court be affirmed.

QUESTIONS PRESENTED

1. Whether the Louisiana Supreme Court was correct in holding that the provisions of Revised Statutes of Louisiana of 1950, Title 14, Sections 47-50, (Criminal Code Articles 47-50, defining and describing the

crime and penalty for Defamation) are not null and void and are not prohibited by the First Amendment to the United States Constitution, guaranteed to citizens of the states by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Louisiana Supreme Court was correct in holding that the provisions of the Louisiana Constitution of 1921, authorizing trial by the judge alone in misdemeanor cases, do not violate the First or Fourteenth Amendments or any provisions of the Constitution of the United States.

3. Whether the holding of the Louisiana Supreme Court was correct in stating that, under Louisiana statutes and law, and under the Federal jurisprudence that the offense of Contempt of Court and the crime of Defamation are separate and distinct and that the doctrine of "clear and present danger" should not be considered in the present Defamation conviction.

STATEMENT

This is an appeal under the provisions of 28 U.S.C. 1257(2), from the final judgment of the Louisiana Supreme Court, upholding the conviction of appellant of the crime of Defamation. In the alternative appellant asks this court to exercise its supervisory jurisdiction under 28 U.S.C. 1257(3) and 28 U.S.C. 2103.

On November 8, 1962, the eight Criminal District Court Judges for the Parish of Orleans, as individuals, filed an affidavit against Jim Garrison, the appellant herein, charging him with defamation in violation of

La. R.S. 14:47. Immediately thereafter, appellant, through Frank J. Klein, appellant's First Assistant District Attorney, dismissed the charge, whereupon the eight Criminal District Court Judges for the Parish of Orleans, State of Louisiana, petitioned the Attorney General under his authority granted by the State Constitution (Article 7, Section 56) to directly charge appellant Jim Garrison with defamation in violation of La. R.S. 14:47, the appellant being a party at interest, namely the accused.

Accordingly, Jim Garrison, appellant, was charged of the crime of defamation on November 15, 1962 in the Criminal District Court for the Parish of Orleans in violation of Louisiana Revised Statutes 14:47. The Bill of Information charging the defendant with the offense of Defamation recites in part:

> "Jack P. F. Gremillion, Attorney General for the State of Louisiana, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one Jim Garrison late of the Parish of Orleans, on the 2nd day of November in the year of Our Lord, one thousand nine hundred and sixty-two with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, did wilfully, unlawfully and maliciously defame each, George B. Platt, Judge of Section 'B', Criminal District Court for the Parish of Orleans and the

presiding judge thereof, and one Malcolm V. O'-Hara, Judge of Section 'A' of the Criminal District Court for the Parish of Orleans, one Edward A. Haggerty, Jr., Judge of Section 'C' Criminal District Court for the Parish of Orleans, one Thomas M. Brahney, Jr., Judge of Section 'D' of the Criminal District Court for the Parish of Orleans, one J. Bernard Cocke, Judge of Section 'E', Criminal District Court for the Parish of Orleans, one Oliver P. Schulingkamp, Judge of Section 'F', Criminal District Court, for the Parish of Orleans, one Shirley G. Wimberly, Judge of Section 'G', Criminal District Court for the Parish of Orleans, and Bernard J. Bagert, Judge of Section 'H', Criminal District Court for the Parish of Orleans, which said judges constitute all the entire bench of the Criminal District Court for the Parish of Orleans, and did publish and express in the public press of the City of New Orleans to persons other than the parties defamed which said publication and expressions are recited herein below of certain things which tend to expose to hatred, contempt and ridicule and deprive such persons of their benefit of public confidence and social intercourse. The said publication and expressions being contained in the following news item reproduced from the New Orleans States-Item, (an afternoon daily newspaper published in the City of New Orleans, Parish of Orleans, published on November 2nd, 1962 which reads as follows, to-wit: . . . ."

Immediately following the above quoted portion of the Bill of Information followed the statement made by appellant to the Press. (See page 31 in the appen-

dix of applicant's brief for the complete defamatory statement of which appellant was convicted.)

On November 13, 1962, the Supreme Court of the State of Louisiana (on the petition of the State) appointed Honorable William H. Ponder, Judge of the Eleventh Judicial District Court, to sit as Judge ad hoc for Section "C" of the Criminal District Court for the Parish of Orleans for the trial of the instant cause, No. 177-418 of the Docket of the Criminal District Court for the Parish of Orleans, entitled "State of Louisiana versus Jim Garrison". (LSA-R.S. 15:-307.) The order was effective immediately. All of the judges of the Criminal District Court for the Parish of Orleans, including the presiding judge of Section "C", to which Section this case had been allotted, recused themselves and Judge-ad-hoc Ponder proceeded with trial of the cause.

Prior to trial on the merits, appellant filed Motions to Recuse Judge-ad-hoc Ponder, a Demurrer, and a Motion to Quash and an Application for a Bill of Particulars on December 4, 1962. On December 5, 1962, appellant filed a Motion for Trial by Jury. All four Motions were overruled by the court, and the State then filed an Answer to appellant's Application for a Bill of Particulars, (See Page 46 of appellant's Jurisdictional Statement). The State also filed a Motion to Recuse District Attorney Garrison, he being a party at interest, which Motion was sustained by the trial court. Appellant was represented in the state courts in proper person and by attorneys Donald V. Organ and Louis P. Trent. We are concerned on this

appeal only with the Demurrer and the Motion for Trial by Jury. Thereafter, appellant was tried and on February 6, 1963, the court rendered its judgment of "Guilty as Charged." Appellant moved for a New Trial and filed a Motion in Arrest of Judgment both of which were overruled.

Appellant as to his Motion for Trial by Jury, Demurrer, Motion in Arrest of Judgment and Motion for New Trial asserts in his jurisdictional statement that "Louisiana's constitutional provision for trial of the charge against him without a jury, and that Louisiana's Statutory Provisions defining and prescribing punishment for the crime of Defamation, could not be applied to appellant in this case without violating his rights under the Fourteenth Amendment to the Constitution of the United States, for the reason that his statements were comments on the judges' official conduct, and did not involve a clear and present danger to the preservation of the peace or to the proper administration of justice." (See page 10 of appellant's jurisdictional statement.)

Appellant, after citing numerous text books and Law Review Articles concludes:

> "From this constitutional principle it follows, first, that 'although jury trial in criminal libel cases may not be guaranteed by the Sixth Amendment as reflected in the Fourteenth,' it must be placed among the constitutional protections of free speech 'ensured by the embodiment of the First Amendment in the Fourteenth.'"

(See page 23 of appellant's jurisdictional statement.)

This apparently is a plea for this Court to note jurisdiction on the mere alleged involvement of a federal question which we specifically deny, there being no federal question involved. There is no authority for the proposition that "freedom of speech" guarantees a jury trial in the prosecution for criminal defamation.

ARGUMENT

In our opinion, appellant has made a deliberate effort to confuse this court by implying that there is no distinction in law between the offense of Contempt of Court and the crime of Defamation. The distinction can readily be seen from the below quoted statutes of Louisiana R.S. of 1950, Title 14 (Criminal Code)

"§47. Defamation

"Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

"Whoever commits the crime of defamation shall be fined not more than three thousand dollars,

or imprisoned for not more than one year, or both."

* * *

"§48. Presumption of malice

"Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

"Where such a publication or expression is true, actual malice must be proved in order to convict the offender."

"§49. Qualified privilege

"A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs; or

(b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such

a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding."

* * *

"§50. Absolute privilege

"There shall be no prosecution for defamation in the following situations:

(1) When a statement is made by a legislator or judge in the course of his official duties.

(2) When a statement is made by a witness in a judicial proceeding, or in any other legal proceeding where testimony may be required by law, and such statement is reasonably believed by the witness to be relevant to the matter in controversy.

(3) Against the owner, licensee or operator of a visual or sound broadcasting station or network of stations or the agents or employees thereof, when a statement is made or uttered over such station or network of stations by one other than such owner, licensee, operator, agents or employees. As amended Acts 1950, No. 469, §1."

Constructive Contempt, Louisiana Code of Civil Procedure, Art. 224(8), is defined in part as, "Comment by a newspaper or other medium for the dissemination of news upon a case or proceeding, then pending and undecided, which constitutes a clear, present, and imminent danger of obstructing or interfering with the orderly administration of justice, by either influencing the court to reach a particular

decision, or embarrassing it in the discharge of its judicial duties."

The Constitution of the State of Louisiana specifically recognizes that freedom of speech is not an absolute privilege, but is subject to limitation for abuse, in accordance with criminal law.

Article 1, Section 3, of the Louisiana Constitution provides as follows:

> "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that liberty.*"

It is well settled that libelous or slanderous utterances are not protected by the freedom of speech guarantee of the first and fourteenth amendments of the U.S. Constitution. *Respublica v. Oswald*, 1 U.S. 319, 1 Dall 319, 1 L.Ed. 155; *Chaplinsky v. State of New Hampshire*, 62 S. Ct. 766, 315 U.S. 568, 86 L.Ed. 1031; *Beauharnais v. People of Illinois*, 72 S. Ct. 725, 343 U.S. 250, 96 L.Ed. 919; *Roth v. U. S.*, 77 S. Ct. 1304, 354 U.S. 476, 1 L.Ed 2d 1498; *Breard v. City of Alexandria*, 71 S. Ct. 920, 932, 341 U.S. 622; *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625, 69 L.Ed. 1138; *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357.

Furthermore, it is settled that the test of "clear and present danger to the administration of justice," although applicable to contempt proceedings, is not applicable to prosecutions under criminal libel or def-

amation statutes. *Chaplinsky v. New Hampshire*, 62 S. Ct. 766, 315 U.S. 568, 86 L.Ed. 1031; *Beauharnais v. People of Illinois*, 72 S. Ct. 725, 343 U.S. 250, 96 L.Ed. 919.

Appellant creates a false issue by confusing contempt of court and criminal libel (defamation.)

Contempt is essentially an offense against the orderly administration of justice, while defamation is essentially a crime against society involving injury to individual human beings.

The purpose of contempt proceedings, which arise from the inherent power of courts to prevent obstructions of justice, is to protect judicial authority from obstruction in the performance of its duties. *Ex parte Hudgings*, 39 S. Ct. 337, 249 U.S. 378, 63 L.Ed. 656; *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190; *Pennekemp v. Florida*, 66 S. Ct. 1029, 328 U. S. 331, 90 L.Ed. 1295; *Wood v. Georgia*, 82 S. Ct. 1364, 370 U. S. 375, 8 L.Ed. 2d 569. "Contempt proceedings are sui generis, neither civil actions nor prosecutions for offenses, within the ordinary meaning of these terms, but an exercise of the power inherent in all courts to enforce obedience, something they must possess in order to perform their functions." *Meyers v. U.S.*, 44 S.Ct. 272, 264 U.S. 95, 68 L.Ed. 577. "A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any interest in the proceedings for its punishment." *Bessette v. Conkey*, 24 S.Ct. 665, 194 U.S. 324.

In *Bridges v. State of California*, 62 S.Ct. 190, 314 U.S. 252, the first contempt case in which this court applied the test of "clear and present danger to the administration of justice," the court pointed out at the outset that it was not dealing with state legislation restricting a specific evil but with the inherent power of courts to punish for contempt. The court stated the following:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' Id. 308. Cf. *Herndon v. Lowry*, 301 U.S. 242, 261-264. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive (them) of the constitution-

al protection.' *Gitlow v. New York*, 268 U.S. 652, 671."

In *Wood v. Georgia*, supra, the most recent contempt case in which the "clear and present danger to the administration of justice" standard was applied, the court again pointed out that there was no state statute allowing the prosecution for contempt, and that, in fact, there was a state statute expressly limiting contempt power over out-of-court statements. The court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements. This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation,' *Bridges v. California*, supra, 314 U.S. at 261, 62 S.Ct. at 192, and it is upon this basis that we proceed."

In all state contempt-of-court cases wherein this court has applied the standard of "clear and present danger to the administration of justice," including *Pennekamp v. Florida*, *supra*, and *Craig v. Harney*, 67 S. Ct. 1249, 331 U.S. 367, 91 L. Ed. 1546, there was no state statute for contempt involved, and thus no legislative determination of a specific danger.

It should further be pointed out that as a matter of substantive difference contempt proceedings do not require actual malice; nor are truth or privilege de-

fenses. In direct contrast, all of the latter safeguards are present in the Louisiana defamation statute. See La. R.S. 14:47-50.

Procedurally, summary contempt proceedings against the contemnor are tried by the same judge. By contrast, the appellant's conviction in the instant case tried before by an impartial judge from a different judicial district approximately three hundred miles from New Orleans, was based on ordinary and regular criminal trial clothed with all the safeguards provided under the Louisiana Constitution and Statutes. In the instant case, the State of Louisiana proceeded in the normal and regular way as with any trial of any individual accused of a misdemeanor.

The appellant herein was not convicted of contempt of court, but was convicted of the crime of defamation of private individuals which is a crime against the peace and dignity of the State of Louisiana. The purpose of criminal libel or defamation statutes is twofold: the preservation of the public peace and the protection of all members of society from injury resulting from malicious utterances. See *Republica v. Oswald*, 1 U.S. 319, 1 dall 319, 1 L. Ed. 155; *Beauharnais v. People, supra;* 2 Wharton's Criminal Law §878, P. 741.

The evil of defamatory utterances is aptly discussed in the Oswald case as follows:

> "With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is

true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeler admit not of this consolation; the injuries which are done to character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort, how shall he be tried, and by whom shall he be acquitted? It is in vain to object, that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antidote as far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to vindicate, which has been employed to defame him; for many will read the charge, who may never see the answer; and while the object of accusation is publicly pointed at, the malicious and malignant author, rests in the dishonorable security of an anonymous signature. Where much has been said, something will be believed, and it is one of the many artifices of the libeler, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be - no!"

Chaplinsky v. State of New Hampshire, 62 S. Ct. 766, 315 U.S. 568, 86 L.Ed. 1031, recognized that

a state has the right to protect its citizens from injury caused by defamatory utterances. Holding that resort to personal abuse, such as "racketeer," was not in any sense communication of information or opinion safeguarded by the federal constitution and that its punishment as a criminal act raised no question under the Constitution, the court made the following observation:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tends to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from th. m is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U.S. 296, 309-310."

The logical conclusion from the *Chaplinsky* decision (supra) is that in prosecutions for criminal libel,

involving words which, by their very utterance, inflict injury or tend to an immediate breach of the peace, the test of clear and present danger (either of injury to the individual who is defamed or of breach of the peace) should not be considered. This conclusion was reached by this court in *Beauharnais v. People of Illinois*, 72 S.Ct. 725, 343 U.S. 250, 96 L.Ed. 919, wherein the court stated:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

The Louisiana defamation statute (R.S. 14:47-50) is in accord with the federal jurisprudence on libelous statements, including what constitutes a defamatory utterance, privilege, fair comment on public officials, and the destruction of privilege by excess or by actual malice. *White v. Nicholls*, 44 U.S. 266, 3 Howard 266, 11 L.Ed. 591; *Dorr v. U.S.*, 24 S.Ct. 808, 195 U.S. 138, 49 L.Ed. 128; *Philadelphia v. Quigley*, 62 U.S. 202, 21 Howard 202, 16 L.Ed. 73; *Gandia v. Pettingill*, 32 S.Ct. 127, 222 U.S. 452, 56 L.Ed. 267; *Farmers Education & Coop Union v. W. Day, Inc.*, 79 S.Ct. 1302, 360 U.S. 525, 3 L.Ed. 2d 1407; *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.

The State of Louisiana, as its defamation statute (R.S. 14:47-50) and its jurisprudence show has no

tolerance whatever for any special claim by judges of immunity from criticism. It is submitted, however, that under the *Chaplinsky* and *Beauharnais* decisions, supra, the first and fourteenth amendments do not deprive the state in a defamation prosecution of its right and duty to preserve the public peace and to protect all members of society, including judges, from the evils of malicious libelous utterances.

Appellant was tried in the same manner as any other person who committed a misdemeanor in accordance with the laws and statutes of the State of Louisiana. This *was not* a prosecution for criticism of the Government. It was a prosecution for the violation of the crime of defamation, a misdemeanor under state law.

For the purpose of outlining our motion in an orderly fashion, we would like to call the court's attention to the pertinent, prudent provisions of the Louisiana Constitution of 1921 and Revised Statutes of Louisiana dealing with trial by jury as applicable to the instant case.

Article VII, Section 41, of the Louisiana Constitution of 1921, provides:

> "*****All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury.* Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must

concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict." (Emphasis ours.)

LSA-R.S. 15:340 recites:

"Every misdemeanor shall be triable by the judge without the intervention of a jury."

LSA-R.S. 15:341 states:

"A misdemeanor is defined to be an offense, the punishment of which is necessarily a fine or imprisonment in the parish jail or both."

LSA-R.S. 14:47, under which the defendant was charged, provides that, "Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year."

There is no provision in the Constitution of the United States requiring a state to try misdemeanors by jury. This conclusion was reached by the Louisiana Supreme Court in its opinion. (See page 73 of appellant's jurisdictional statement.)

Appellant correctly concedes that in no manner is Article 6 of the Bill of Rights a limitation on the State; and that it is inapplicable to State proceedings. See 31 Am.Juris., Verbo, Jury, Sections 8-10, pp. 14-17, 16 R.C.L. pp. 200, Section 19 and Supp. pp. 4060, Section 19; 22 A.L.R. 1504. However, appellant attempts by legal legerdemain to assert that trial by jury is a fundamental right of freedom of speech constitutionally guaranteed to him. Appellant cites no authority for this proposition. *Nye v. U.S.*, 313 U.S.

33, cited by appellant as emphasizing the jury question, had nothing to do with freedom of speech under the first amendment, but merely involved the construction of an 1832 amendment of the 1789 federal statute concerning summary contempt by Federal Courts. All that the court pointed out was that abuses of the summary nonjury contempt power by federal judges had led Congress to enact the amendment. The other case cited by appellant as "emphasizing the jury question" is *Craig v. Harney*, supra, a contempt proceeding wherein the Court was concerned with the self-interest of the same judge whose conduct was criticized to sit in judgment upon the contemnor, and summarily, and without a jury trial to punish him. The instant case does not involve the power of the same judge who was defamed to sit in judgment upon the defamer. Appellant was convicted only after a regular criminal trial before a different judge who had no personal interest whatever in the case.

It has long been settled that trial by jury is not embraced in the rights secured by the fourteenth amendment to the Federal Constitution. *New York Central Railroad v. White*, 243 U.S. 188 37 S. Ct. 247, 61 L.Ed. 667; *Hawkins v. Bleakly*, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678; *Snyder v. Massachusetts*, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330; *Chappell Chemical Company v. Sulphur Mines*, 172 U.S. 474, 43 L.Ed. 520, 19 S.Ct. 268; *Southern Railway Company v. Durham*, 266 U.S. 178, 45 S.Ct. 51, 69 L. Ed. 231; 31 Am. Jur Verbo Jury, Sections 8-10, pp. 14-17. Accordingly, when state statutes prescribe the

trial of issues by a judge without a jury, there is nothing in the federal constitution requiring trial by jury. *Southern Railway Company v. Durham, supra, Dorr v. U.S.*, 24 S. Ct. 808, 195 U.S. 138, 49 L.Ed. 128.

On the trial of this matter, appellant had the opportunity to interpose the defense of truth or reasonable belief of truth. Despite the fact that each and every complainant testified under oath that the statement made by appellant and set forth in toto in the Bill of Information was untrue, appellant did not offer any evidence to rebut this testimony.

Appellant had been informed that the state intended to prove malice in law and malice in fact by the state's answer to appellant's application for a bill of particulars.

During the trial the state introduced evidence showing other statements of appellant which the court found substantiated the state's contention that the statement of appellant constituted malice in law and also malice in fact.

We would also like to point out that four of the complainants testified that the defamatory statement of appellant subjected them to ridicule, embarrassment and contempt.

We are not going into the merits of the case on this motion, but it is necessary to set forth certain facts, which tend to show that appellant has failed to present a substantial Federal question. At this time, we would respectfully refer the court to the

quoted portion of the Bill of Information set forth above, (see p. 31 thru 38 of of appellant's jurisdictional statement) as the Bill of Information clearly shows that the judges were individually defamed and the appellant has attempted to ignore this in his jurisdictional statement and speaks only of "breach of peace" when discussing the jurisprudence dealing with criminal libel (Defamation).

We quote from *Beauharnais v. The People of the State of Illinois*, 343 U.S. 250, 251, 72 Supreme Court 725, 728, as follows:

> "The petitioner was convicted upon information in the Municipal Court of Chicago of violating Sec. 224a of Division 1 of the Illinois Criminal Code, Ill. Rev. Stat. 1949, c. 38, Sec. 471. He was fined $200. The section provides:
>
> > 'It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. * * *'
>
> "Beauharnais challenged the statute as violating the liberty of speech and of the press guaranteed as against the States by the Due Process Clause

of the Fourteenth Amendment, and as to vague, under the restrictions implicit in the same Clause, to support conviction for crime. The Illinois courts rejected these contentions and sustained defendant's conviction. 408 ILL. 512, 97 N.E. 2d 343. We granted certiorari in view of the serious questions raised concerning limitations imposed by the Fourteenth Amendment on the power of a State to punish utterances promoting friction among racial and religious groups. 342 U.S. 809, 72 S. Ct. 39.

"The information, cast generally in the terms of the statute, charged that Beauharnais 'did unlawfully * * * exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes (sic) citizens of Illinois of the Negro race and color to contempt, derision, or obloguy * * *'. The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago 'to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro * * *'. Below was a call for 'One million self respecting white people in Chicago to unite * * *', with the statement added that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions * * * rapes, robberies, knives, guns and marijuana of the negro, surely will.' This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.

"The testimony at the trial was substantially undisputed. From it the jury could find that Beauharnais was president of the White Circle League; that, at a meeting on January 6, 1950, he passed out bundles of the lithographs in question, together with other literature, to volunteers for distribution on downtown Chicago street corners the following day' that he carefully organized that distribution, giving detailed instructions for it; and that the leaflets were in fact distributed on January 7 in accordance with his plan and instructions. The court, together with other charges on burden of proof and the like, told the jury, 'if you find * * * that the defendant, Joseph Beauharnais, did * * * manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place the lithograph * * * then you are to find the defendant guilty * * * .' He refused to charge the jury, as requested by the defendant, that in order to convict they must find 'that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.' Upon this evidence and these instructions, the jury brought in the conviction here for review.

"The statute before us is not a catchall enactment left at large by the State court which applied it. Cf. *Thornhill v. State of Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; *Cantwell v. State of Connecticut*, 310 U.S. 296, 307, 60 S. Ct. 900, 904, 84 L. Ed. 1213. It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning con-

firmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage, *Nash v. United States*, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232, and State court construction which determines its meaning for us. *Cox v. State of New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; *Chaplinsky v. State of New Hampshire*, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.

"The Illinois Supreme Court tells us that § 224a 'is a form of criminal libel law'. 408 Ill. 512, 517, 97 N.E. 2d 343, 346. The defendant, the trial court and the Supreme Court consistently treated it as such. The defendant offered evidence tending to prove the truth of parts of the utterance, and the courts below considered and disposed of this offer in terms of ordinary criminal libel precedents. Section 224a does not deal with the defense of truth, but by the Illinois Constitution, Art. II § 4, S.H.A., 'in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.' See also Ill. Rev. Stat., 1949, c. 38, § 404. Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other States. Moreover, the Supreme Court's characterization of the words prohibited by the statute as those 'liable to cause violence and disorder' paraphrases the traditional justification for punish-

ing libels criminally, namely their 'tendency to cause breach of the peace.'[1]

"Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. State*

[1] See, e.g., *People v. Spielman*, 318 Ill. 482, 489, 149 N.E. 466, 469; Odgers, Libel and Slander (6th ed.), 368; *Kennerly v. Hennessy*, 68 Fla. 138, 66 So. 729, 19 A.L.R. 1470. Some States hold, however, that injury to reputation, as in civil libel, and not tendency to breach of the peace, is the gravamen of the offense. See Tanenhaus, Group Libel, 35 Cornell L.Q. 261, 273 and n. 67.

> *of Connecticut*, 310 U.S. 296, 309, 310, 60 S. Ct. 900, 906, 84 L. Ed. 1213.' Such were the views of a unanimous Court in *Chaplinsky v. State of New Hampshire, supra*, 315 U.S. at pages 571-572, 62 S. Ct. at page 769.

Stripped of nonessentials, appellant's claim is one of federal immunity or privilege from prosecution for defamation for the sole reason that his defamatory remarks were directed toward persons who happened to be District Court Judges.

In R.S. 14:49, the Louisiana Defamation Statute grants a qualified privilege for fair criticism or fair comment upon judges' official conduct.

During the trial of this case, appellant raised the defense of qualified privilege, this defense was passed upon by the State Trial Court, which found as a fact from the evidence before it, that the defendant did not have a qualified privilege under LSA R.S. 14:49 because there was no proof adduced of appellant's reasonable belief in the truth of his utterance and because his utterance, in certain respects, abused the privilege by going beyond mere criticism or comment; that even if qualified privilege had existed, it was destroyed by defendant's actual malice which was shown by the evidence, produced by the state on the trial of the case. These determinations of the Trial Court were affirmed by the State Supreme Court and are in harmony with the federal jurisprudence on libel.

In granting appellant a qualified privilege from prosecution for defamatory expressions about judges'

official conduct, LSA R.S. 14:49 gave him the same right to criticize judges which is guaranteed under the free speech provisions of the First and Fourteenth Amendments. When the State Court considered appellant's defense of qualified privilege and determined from the facts and the evidence of the case that appellant's utterance was not qualifiedly privileged under LSA R.S. 14:49, it based its decision upon a non-federal ground, independent of the federal question involved, broad enough to sustain the judgment and in harmony with the decisions of the United States Supreme Court in libel cases. The United States Supreme Court has always refused to review judgments of State Courts that rest on adequate and independent state grounds. *McCoy v. Shaw*, 277 U.S. 302, 48 S. Ct. 519, 52 L. Ed. 891; *Mellon v. McCafferty*, 239 U.S. 134, 36 S. Ct. 94, 60 L. Ed. 181, *People of N.Y. ex rel Doyle v. Atwell*, 216 U.S. 590, 43 S. Ct. 410, 67 L. Ed. 814; *Lynch v. People of N. Y.*, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191; *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158; *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789.

From a reading of the opinion of the Louisiana State Supreme Court, one must conclude that its decision was in accord with both the State and Federal jurisprudence. While it is a well established legal principle that it may, with some show of reason, be said that, no matter how lacking in merit the Federal contention may be, the Supreme Court of the United States cannot logically, for that reason alone, decline to entertain jurisdiction of a writ of error to a state

court, still the court is committed to the doctrine that a real, and not a fictitious, Federal question is essential to the exercise of this jurisdiction. *Hamblin v. Western Land Co.* 147 U.S. 531, 37 L. Ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans v. New Orleans Waterworks Co.* 142 U.S. 79, 35 L. Ed. 943, 12 Sup. Ct. Rep. 142; *Millingar v. Hartupee*, 6 Wall. 258, 18 L. Ed. 829; *Caldwell v. Texas*, 137 U.S. 692, 34 L. Ed. 816, 11 Sup. Ct. Rep. 224; *St. Louis, C.G. & Ft. S.R. Co. v. Missouri*, 156 U.S. 478, 39 L. Ed. 502, 15 Sup. Ct. Rep. 443; *Illinois C.R. Co. v. Chicago*, 176 U.S. 646, 44 L. Ed. 622, 20 Sup. Ct. Rep. 509; *Equitable Life Assur. Soc. v. Brown*, 187 U.S. 308, 47 L. Ed. 190, 23 Sup. Ct. Rep. 123; *Clarke v. McDade*, 165 U.S. 168, 41 L. Ed. 673, 17 Sup. Ct. Rep. 284; *Iowa v. Rood*, 187 U.S. 87, 47 L. Ed. 86, 23 Sup. Ct. Rep. 49.

A Federal question may have been so explicitly foreclosed by prior federal decisions as to afford no basis for a writ of error from the Supreme Court of the United States to a state court. *Leonard v. Vicksburg*, S. & P.R. Co. 198 U.S. 416, 49 L. Ed. 1108, 25 Sup. Ct. Rep. 750.

No substantial federal question is presented when the state court is clearly correct in its interpretation of the federal question, and where the federal question suggested has been foreclosed by previous federal jurisprudence. *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Palmer Oil Corporation v. Amerada Petroleum Corporation*, 343 U.S. 390, 96 L.Ed. 1022, 72 S.Ct. 842; see 36 C.J.S. Verbo Federal Courts, Sec. 243, p. 715; *Minneapolis Ry. Co. v. Merrick*, 41 S.Ct.

142, 254 U.S. 376, 65 L.Ed. 312; *Manhattan L. Ins. Co. v. Cohen*, 34 S.Ct. 874, 234 U.S. 123, 58 L.Ed. 1245.

The Louisiana Supreme Court is undubitably correct in its opinion on both the state and federal questions as can be seen by reference to the opinion and the authorities cited above. The jurisprudence is well settled that libelous utterances are not within the area of constitutionally protected speech under the first amendment of the constitution of the United States, and such libelous utterances can be prohibited by state law which imposes criminal penalties.

We would also like to point out that appellant in the instant case has written his jurisdictional statement on the false premise that the appellant's statement in the Bill of Information was a fair comment on the conduct of the judges in their official capacity. This is obviously a false assumption as the appellant's remarks were not a comment on the judges' official conduct, but were a false statement constituting purely personal abuse.

The mere fact that the persons defamed are district judges is no excuse. Nor does it afford the appellant a license to defame them at will.

It is a well-settled principle of law that federal questions which rest upon an obviously false assumption are so plainly devoid of merit as to afford no basis for the exercise by the United States Supreme Court of its appellant jurisdiction over the state court of last resort. *Parker v. McLain*, 237 U.S. 469, 59 L. Ed. 1051. Mover emphasizes that the Supreme Court

of Louisiana found the statement of appellant contained in the bill of information to be a violation of LSA-R.S. 14:47-50 for the following reasons, which we quote from the Court's opinion:

> "In the instant matter, it cannot be gainsaid that the use of the words 'racketeer influences' when applied to anyone suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty.
>
> "The expression that the judges have enjoyed 300 days vacation out of 19 months suggests and connotes a violation of the 'Deadhead' statute, LSA-R.S. 14:138, Public Payroll Fraud.
>
> "Other expressions set out in the Bill of Information connote malfeasance in office. LSA-R.S. 14:-134, Art. IX, Sec. 1, La. Const. of 1921."

Chaplinsky v. New Hampshire, 62 S. Ct. 766, 315 U.S. 568, 86 L. Ed. 1031, held that the term "racketeer" is an epithet likely to provoke the average person to retaliation, and thereby cause a breach of peace.

CONCLUSION

For all of the foregoing reasons, appellant has failed to raise any substantial federal question, and the appeal should be dismissed, and the alternative plea for writs of certiorari should be denied.

In the alternative, the decision of the State Court should be affirmed as being in accordance with the Federal Constitution and the Federal jurisprudence.

Respectfully submitted,

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CERTIFICATE

I, Michael E. Culligan, a member of the Bar of the United States Supreme Court, hereby certify that this 15th day of September, 1963, a copy of the above and foregoing motion was served on Eberhard P. Deutsch, Hibernia Bank Building, New Orleans 12, Louisiana, by depositing same in the United States Mail, postage prepaid.

Of Counsel.